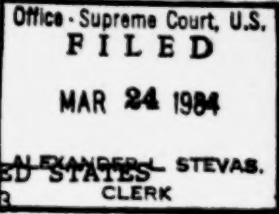


NO. 83-305

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983



THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

ALBERT WALTER TROMBETTA, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

BRIEF OF AMICUS CURIAE IN
SUPPORT OF RESPONDENTS

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BRIEF OF AMICUS CURIAE IN
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____○____

INTEREST OF AMICUS CURIAE

The organizations filing this Amicus Curiae brief are comprised of members who represent persons charged in drunk driving cases. These organizations have an interest in avoiding a resolution of the issues presented in this case on the facts claimed by petitioner, since those facts are not those in the record and found by the lower court. In addition, these organizations have an interest in not having a broad decision in an area where many of the pertinent facts are not disclosed by this record. Finally, the passage of an intervening statute renders the questions presented in this case of no further importance in California.

SUMMARY OF ARGUMENT

The entire basis of Petitioner's position is the claim that no device exists which can preserve the breath of a defendant for use in a drunk driving prosecution. Thus, petitioner concludes that the issue is whether due process prevents the use of a breath-testing machine which cannot preserve a breath sample. In fact, there is a device which can preserve a breath sample for later retesting. This fact was the basis for the decision of the California Court of Appeal, and was shown without contradiction in the trial record. Thus, the factual record in this case does not permit a determination of the Question Presented as framed by petitioner.

Apart from the facts as they actually exist in this case, there are additional facts relating to this area

of scientific inquiry. Those additional facts affect the accuracy of the breath-testing machine, and show that only through the use of the device which preserves a breath sample can an accurate result of a suspect's blood alcohol level be determined for a drunk driving prosecution. Thus, this case does not present a complete factual record on which broad due process determinations can be made, and in fact presents only an issue of limited effect.

As petitioner recognizes, a new statute has been enacted relating to this area. California Health and Safety Code section 13353.5, effective September 15, 1983, now provides that when an arrestee in a drunk driving case takes a test on a machine which does not preserve a sample of that breath, the arrestee must be advised of the right to a preserved sam-

ple, and must either take a second test which will be preserved or waive the right to a preserved sample. Thus, the use of the breath testing machines which destroy the breath sample has been protected, even under petitioner's analysis, since either a second, preserved test is taken, or an express waiver of the right to a preserved test occurs. Therefore, the issues presented by petitioner cannot occur in any future case in California.

ARGUMENT

I

AN APPROVED DEVICE EXISTS WHICH PRESERVES A BREATH SAMPLE AT THE TIME OF A TEST; THUS, THE QUESTION ON WHICH THIS COURT GRANTED CERTIORARI IS NOT AT ISSUE IN THIS CASE

The factual premises of petitioner in this case are quite clear. Petitioner's entire brief is premised on his claim that there is no device--that is, no device exists--which can collect and preserve a sample of the breath of a suspect in a drunk driving case, so as to permit that breath to be retested for a blood alcohol reading at a later time. Petitioner claims that the breath

testing machines_1/ currently in use completely destroy the breath being tested, and since there is no other method of preserving the breath, the decision of the California Court of Appeal means that breath-testing machines can no longer be used in California. The entire factual premise of petitioner is untrue.

Petitioner's position can be seen from two passages. Petitioner states, "In other words, there is no device what-

1 For simplicity and consistency, Amicus Curiae will use the term "breath testing machines" throughout this brief to refer to all types of machines used to determine blood alcohol levels by testing breath. In the scientific literature, some of which is referred to in this brief, the technical term for these machines is "Evidential Breath Testers", or "EBT".

soever which would permit the defendant to retest--however unreliably--the same sample is the same form as that tested by the police." (Brief for the Pet., p. 17.) Again, petitioner contends, "Not only are there no breath analysis instruments approved for use in California which themselves capture and preserve a breath sample, but there are no capturing devices approved to attach to them. As a matter of fact, the scientific body which the California Legislature established to advise the Department of Health on matters of this sort (Cal. Health & Saf. Code, Sec. 436.50) has recently concluded that no device currently exists anywhere which would permit a reliable retest of a breath sample. Advisory Committee on Alcohol Determination, Department of Health, Notes of Meeting of August 31, 1982, p. 29." (Brief for the

Pet., pp. 27-28.) These two sentences seem to state that there is no device which can preserve the breath used in a breath test so as to permit retesting of that sample. (See also Brief for the Pet., pp. 15-17, 22, fn. 14.)

It is this factual premise which leads to the issues presented by Petitioner. If there is no way to preserve a breath sample, then the decision of the California Court of Appeal below that the failure to preserve a suspect's breath is a violation of due process of law and requires suppression of the results of any test on that breath leads to the Question Presented by Petitioner: "Does a duty to preserve evidence under federal due process forbid the use in a drunk driving case of a breath-testing machine which automatically expels and thus destroys the breath sample during

the test process?" (Brief for the Pet., p. 1; see also Pet. for Writ of Cert.)

Ironically, petitioner criticizes the California Supreme Court's decision in People v. Hitch (1974) 12 Cal.3d 641, 527 P.2d 361, "because it is simply wrong on the facts." (Brief for the Pet., p. 25, fn. 17.) In fact, Petitioner is simply wrong on the facts as he presents them to this court. Astonishingly, petitioner never recognizes that the entire basis for the decision of the California Court of Appeal below in this very-case was that a device does exist and is approved to capture and preserve a suspect's breath sample in a drunk driving case. (See pp. A-6, A8-9, and A-14 of the opinion of the California Court of Appeal, as numbered in the attachment to the Pet. for Writ of Cert.) That court quite specifically stated, "The question then

is whether the specimen may be exhausted in testing without taking available steps to obtain and preserve another specimen for retesting." (Opn. of the Court of Appeal below, at p. A-14, as numbered in the attachment to the Pet. for Writ of Cert.; emphasis added.)

Petitioner never contends that the factual finding of the California Court of Appeal is without a substantial basis in the trial record. The record in fact shows uncontradicted evidence of the existence, approval and reliability of the device to preserve breath samples. Significantly, in the sections of the Brief for the Petitioner quoted above, Petitioner does not cite any authority or anywhere in the record in support of his claim that no device exists which can preserve a breath sample, except for a reference to the Notes of a Meeting of

an Advisory Committee on Alcohol Determination. These Notes are not part of the record, nor can they overcome the factual finding of the California Court of Appeal and the uncontradicted evidence of the trial record in this case.

These Notes are the minutes of a meeting an Ad Hoc committee of this Advisory Committee and not the Committee itself, which occurred on August 31, 1982. Counsel for petitioner does not disclose that he was personally present at that meeting. (Exh. A to this Brief, cover page.) Of course, the California Court of Appeal issued its Order to Show Cause on several of these cases on April 28, 1982. (Joint Appendix, hereafter "J.A." pp. 4, 5.) Thus, the device at issue was in litigation in the Court of Appeal for some months prior to the meeting of this committee of which counsel for Petitioner

was present.

Petitioner does not mention that on the very page before the one cited to this court, the following entry appears: "Therefore, the Ad Hoc Committee recommended to the Advisory Committee on Alcohol Determination the deletion of remote collection and later analysis from the regulations in title 17." (Exh. A herein, p. 28.) Of course, it is not possible to recommend deletion of something not already approved. Thus, the very Committee Notes cited by Petitioner support the point being made here--the device at issue exists and has been and is now (there is no indication that the Committee's recommendation has been followed) approved for use in California. The Notes of this meeting were not made part of the Joint Appendix in this case. However, the list of instruments

approved by the Department of Health was made part of the Joint Appendix in this case. However, the list of instruments approved by the Department of Health was made part of the Joint Appendix (J.A. pp. 238-258), and includes the approval of the Intoximeter Field Crimper-Indium Tube Encapsulation Kit (J.A. pp. 247, 257-258), the device which preserves breath samples.

The actual page cited by Petitioner hardly supports the flat assertion made about it. Petitioner asserts that the Committee "concluded that no device currently exists anywhere which would permit a reliable retest of a breath sample." (Brief for the Pet., pp. 27-28.) As the attached copy of the page cited, page 29, shows, the actual text is as follows:

"The Ad Hoc Committee next considered a series of other issues related to the capture of breath alcohol samples for later analysis. These issues are summarized in the following statements: . . .

"3. There is no reliable and practical way to retain a breath sample for referee analysis inasmuch as there is no breath sample capturing device which can meet the performance standards with regard to: air blank, calibration with a standard solution; quality control with a reference sample."
(Exh. A herein, p. 29.)

Referee analysis is an analysis using the device here at issue by attaching the machine to the breath-testing machine (as opposed to obtaining a sample by having the suspect blow into

the device all by itself, unattached to anything, called "remote analysis.>"). Thus, even the sentence quoted does not show that no device exists at all which can retest a breath sample. The quoted language is something less than an express finding, and may only be a statement of the topic under discussion. In any event, this is not in the record. As noted herein, the trial record clearly shows the existence and approval of the device for preservation and retesting of breath samples.

Petitioner makes only two references to the trial court record, both times merely citing the trial court's statement that "without an addition" to the breath testing machine, there is no sample which can be preserved. (Brief for the Pet., pp. 7-8, 15.) This simply ignores the record in the trial court, where it was

shown without contradiction that the Intoximeter Field Crimper-Indium Tube Encapsulation Kit is a device which can be used, either attached to the breath-testing machine or separately, to accurately preserve a breath sample for later retesting. The trial court made no adverse finding on this point, nor would the evidence have permitted any such finding. In fact, the parties in the trial court, including a representative of the People, expressly stipulated that the device was approved and available to take a breath sample for later testing. (J.A. pp. 165-168; 183-184.) The list of instruments approved for use in California, including the device at issue herein, was submitted to the trial court as Exhibit D, and is found at the Joint Appendix, pp. 238-258. Moreover, there was uncontradicted testimony in

the trial court from expert witnesses to the effect that the device exists, is approved, produces a valid sample which can be reliably preserved, and is financially feasible. (J.A., pp. 175-178, 184-186, 193-194, and 196-197.) An affidavit was also filed with the trial court, wherein another expert stated that the device exists, is approved, and works. (J.A., pp. 202-204.)

All petitioner says about this is that no preserved breath sample could be material unless it "were proven that a practical means of preservation exists which permits a reliable retest." (Brief for the Petitioner, p. 26.) Petitioner then states, "The trial court below did not make such a finding. The California Court of Appeal refused to address the issue." (Brief for the Pet., p. 27.) It is true that the trial court made no

specific finding at all as to the device for preservation of a breath sample, but that is hardly a finding adverse to the device. As noted above, the trial record is replete with evidence, none of which is contradicted, that the device has been approved, works, and is a reliable means of preserving the breath sample for re-testing.

In sum, the uncontradicted testimony presented in the trial court established the existence, approval, and reliability of this device. The Court of Appeal expressly relied upon this evidence as the factual basis for its opinion. Thus, petitioner's unsupported assertions to the contrary are the opposite of the actual facts shown in this case. Since the factual premises of petitioner are untrue, the entire Brief for the Petitioner is irrelevant to this case. Given

these factual problems, this court should consider vacating its grant of certiorari as having been improvidently granted. This court has ruled that the writ of certiorari will be dismissed as having been improvidently granted where the "record does not adequately present the questions tendered in the petition." (Needelman v. United States (1960) 362 U.S. 600, at p. 600.) The writ of certiorari has been dismissed where the "actual facts simply do not present the issue for which certiorari was granted" (Conway v. California Youth Authority (1969) 396 U.S. 107, 109-110; see also Bostic v. United States (1971) 402 U.S. 547, 548.) At the very least, this court should decide the case based on the facts presented in this record, and not on petitioner's incorrect allegations of the facts.

II

ADDITIONAL FACTS NOT FOUND IN
THIS RECORD RENDER PETITIONER'S
FACTUAL ASSUMPTIONS UNTRUE

Apart from the facts as actually shown in the trial and appellate record of this case, there are many additional facts relating to the device at issue and the validity of the breath-testing machines themselves that are not shown in this record. Obviously, there is no space in this brief to exhaust these additional facts. But some of the more salient pieces of information will be presented, to show that there is far from a complete record presented in this case. Thus, any decision of this court will be of limited value, if any.

Petitioner makes two crucial assumptions which must be noted. First, petitioner assumes that breath testing

machines (if their records show no errors and a new test turns out correct) never make mistakes--i.e., are infallible. Of course, this would make preservation of a breath sample unnecessary. Second, petitioner assumes that there is no reliable method of preserving a breath sample for later retesting. In fact, both of these premises are false.

The first assumption underlying petitioner's brief is that breath-testing machines are completely accurate, and that all a different reading from retesting a breath sample could ever result in is a check of the breath-testing machine's logs (records of performance in the past) and a retest of the breath-testing machine with another sample. (Brief for the Pet., pp. 20-21, 26, and 28.) Petitioner concludes that

the breath-testing machine can always be rechecked even without a preserved sample, thereby eliminating the need for such preservation. (Brief for the Pet., pp. 26, 28.) Thus, petitioner assumes that if the records of the breath-testing machine show no errors, and a new test of another sample yields an accurate result, this establishes the unerring accuracy of the breath-testing machine. In other words, if the breath-testing machine produces a reading of .15, and a test of the preserved breath sample yields a reading of .04, the breath-testing machine is the correct one if the records of the machine show no problems and a new test produces an accurate result. In short, petitioner's unarticulated assumption is that breath machines which retest properly are always correct. Petitioner assumes that

if the breath-testing machine retests accurately, then whatever reading is obtained from the testing of a preserved sample must be wrong. 2/

Secondly, petitioner assumes that there is no reliable method of preservation. As noted above, the trial record shows without contradiction that the device at issue herein does exist, has been approved, and preserves a breath sample which can be reliably tested.

The problem with petitioner's assumptions is that they are untrue. In fact, breath testing machines are subject to errors which cannot be found by checking records and retesting the machine. Moreover, using the preserved sample is the only means of overcoming

² This assumption is hard to follow. In fact, the preserved sample would yield a blood alcohol reading by being tested on a breath-testing machine.

this problem. This information was not presented in the trial court, but it is critical to the true state of facts surrounding the accuracy and reliability of breath-testing machines.

A.

Radio Frequency Interference can cause undetectable errors in breath-testing machines.

The breath-testing machine involved in this case, along with every breath-testing machine in existence, can be adversely affected by Radio Frequency Interference, referred to as "RFI". (James H. Kaster "Breathalyzer Testing Possibilities for Error", 40 Bench and Bar of Minnesota, 11, 12 (Dec. 1983).

Radio frequency interference is defined, in the McGraw-Hill Dictionary of Scientific and Technical Terms (2nd Ed 1978, as interference from sources of

energy outside a system or systems.

Radio frequency interference has been around as long as electronic instruments themselves and on a daily basis radio waves interfere with the proper operation of all types of electronic instruments, causing "snow" or lines on television sets, static on radios, interrupted CB transmissions; malfunctioning of all types of appliances such as microwave ovens, mix masters, toaster ovens, and phone conversations. (James Feldman and Harvey Cohen "The Questionable Accuracy of the Breathalyzer Test" Trial Magazine, vol. 19, No. 6, June, 1983, p. 54.) It is clear most electronic equipment is subject to radio frequency interference. (Feldman, supra, p. 1.) Until 1982, this scientific principle of interfering waves from radio transmissions adversely affecting breath-

testing machines, had never been considered.

In 1982, the Washington Metropolitan Police Department in the District of Columbia along with other law enforcement agencies complained to the United States Government that radio waves from police walkie talkies were interfering with the proper operation of the breath-testing machines. (U.S. Department of Transportation Law Enforcement Standards Laboratory, National Engineering Laboratory, National Bureau of Standards, NHTSA Technical Report, DOT HS 806-400 "Limited Electromagnetic Interference testing of Evidential Breath Testers", hereinafter cited as "National Bureau of Standards Report". See also, Reese I. Joye, Jr. "Drunk Driving", Trial Magazine, vol. 19, No. 6, June, 1983, pp. 62-66.)

The National Bureau of Standards in Boulder, Colorado was requested to investigate the operation of all breath-testing machines sold and utilized in the United States to ascertain if radio frequency interference was producing false readings as the police agencies had complained about to the U.S. Government. (National Bureau of Standards Report.) After extensive testing of twenty-five machines, a report was released in May 1983 by the U.S. Department of Transportation National Bureau of Standards Report. This report was made public June 1, 1983. (News release Department of Transportation, June 1, 1983.) Only sixteen of the machines were able to withstand the tests. Of those machines, nine had false readings at various radio strengths caused by hand-held walkie talkies which were held

within three feet of the breath-testing machine. In other words, a person could be convicted because of a reading on the breath-testing machine used in this case, 3/ when the arrestee was not under the influence and when the actual blood alcohol level was less than .10% even though the reading was over a .10% blood alcohol. 4/

3 CMI, Inc. is the manufacturer of the breath-testing instruments utilized by the respondents in this case. CMI, Inc. manufactures the omnicron intoxilizers 4011, 4011A, 4011AS, 4011AW.

4 The facts cited are, as noted, not in the trial record of this case. It is Amicus Curiae's intent to state these facts to the court precisely to show the lack of a complete record on these technological issues. Amicus is not requesting a decision on these facts; quite the contrary, Amicus suggests that any decision should be sharply limited in light of these additional facts not presented in these cases or that the writ of certiorari be dismissed as having been improvidently granted. In any event, judicial notice of these facts can be taken under Rule 201, subdivision (b), Federal Rules of Evidence, as facts capable of accurate and ready determination

The Ohio State Highway Patrol, in a separate and totally unrelated experiment to that of the National Bureau of Standards, came to the identical result and conclusion that the federal government was to reach six months later. The Ohio State Highway Patrol found that the 4011 Intoxilizer was ". . .affected by RF . . ." and that ". . .the distortion could be caused to result from the intoxilizer by RF that a trained operator would not be able to observe." "The RF was observed to affect the reading in many different ways. It was observed to produce a consistent steady climb to .450 on one instrument. In other instruments, it produced a negative reaction and jumped to extremes without any steady

by resort to sources whose accuracy cannot reasonably be questioned. The citations to those sources is found throughout this brief.

climb." (Ohio State Highway report for Cap. J. W. Rohal, June 7, 1982, E. Helton, June 14, 1982.

In one experiment, a police walkie talkie was held within three feet of the intoxilizer and a blood alcohol solution of .105 produced a reading of .450 with radio frequency interference. Another walkie talkie, up to 21 feet away in an adjoining room with the door shut, caused an affect on a 4011 intoxilizer. (Capt. C. J. Hunter, Ohio State Highway Patrol memo, Dec. 1, 1982.) -

The Smith and Wesson Company which manufactures and sells breath-testing machines called Breathalyzer models 900 and 900A, in a totally independent study to the National Bureau of Standards and the Ohio State Highway Patrol, found radio frequency interference in their machines in 1981. The investigation by

Smith and Wesson arose due to complaints of erroneous breath readings in New Jersey and Florida. Smith and Wesson in extensive analysis of radio frequency interference and its affect upon models 900 and 900A culminated in the Smith and Wesson Advisory sent out to customers on September 10, 1982. The Advisory advised customers that their ". . .continuing investigation now suggests that this early series of breath testing instruments may be affected in an unpredictable manner by various frequencies and power levels." (Smith and Wesson Customer Advisory, Sept. 10, 1982; see also, Erwin, Drunk Driving, Feb. 1984 supplement 22-1 to 22-41.5(4).)

The police department in West Point Pennsylvania, conducted a similar experiment on an breath-testing machine called the Model 1000 SA Alco-Analyzer Gas

Chromatograph using a hand-held police walkie talkie. Sergeant Robert A. Freed found that the Alco-Analyzer was subject to radio frequency interference at various frequencies at various times and distances. Sergeant Freed reported erroneous readings at 9.1 meters (30 feet) outdoors away from the Alco-Analyzer. (Robert A. Freed "Radio Frequency Interference with Model 1000SA Alco-Analyzer Gas Chromotograph" 28 Journal of Forensic Services, 985, 986 (Oct. 1983).)

New Jersey has also conducted tests on radio frequency interference independent of all previously mentioned tests, and determined based on the experiments conducted by Sergeant First Class Kenneth Neubauer, the officer in charge of the New Jersey State Police Breath Testing unit, that radio frequency interference affected nearly all the breathalyzer

machines under his supervision. The tests were performed at the Mammoth Beach Marine Headquarters and the tests resulted "in obvious deflection of the needle and interference with the reliability of the machine by radio frequency waves". Further, Norman Coultir, New Jersey State Radio Frequency Coordinator Analyst authored a report for the State of New Jersey showing the susceptibility of the breathalyzer to radio frequency interference. (Drinking/Driving Law Letter, vol. 2, no. 15, July 22, 1983, p. 2-4.)

The recommendation of all five studies, as well as the studies from the State of Minnesota, is to turn off the walkie-talkies and leave them outside before testing arrestees who are suspected of driving under the influence of alcohol.

In California, local police departments (such as the Los Angeles Police Department) and the California Highway Patrol require law enforcement officers to be equipped with walkie-talkies for immediate use in emergencies and communication with the police station and other law enforcement personnel. Law enforcement personnel are required to turn their walkie talkies in an "on" or transmission mode when leaving their law enforcement vehicles so that they can be made aware of any emergencies. Each law enforcement vehicle has an extender unit so that the walkie talkie can transmit at great distances. (Reporter's Transcript of oral proceedings in People v. Charles Henry Allen, case number V-165205, and People v. Errol Stanley Leslie, case number V-165530, in a hearing conducted in Division 75 of the Los

Angeles Municipal Court, on November 28, 1983; pp. 15, 32.) Law enforcement officers at the time of administering breath tests to arrestees suspected of driving under the influence are, of necessity, standing only two or three feet away at the time of administering the breath test. Hence, at the time the breath tests were administered to respondents, radio frequency interference could have affected the breath result.

As pointed out by the National Bureau of Standards, radio frequency interference affected some machines differently at different times and it is impossible to recreate the exact factors which could have caused the results of a malfunction in any one particular case.

The insidious nature of radio frequency interference cannot be readily recreated without showing exactly what

radio wave at exactly what strength interfered with the machine in question. Further, the radio wave is picked up by one of the numerous wires inside the intoxilizer and which is interconnected with one of three circuit boards within the machines. The wires serve as antenna for the radio wave which causes the electronic circuit board to cause an erroneous reading.

As a result of vigorous investigation of radio frequency interference, and the effect of radio frequency interference upon the breath-testing machines authorized by individual states, several states have established protocols to deal with radio frequency interference (Minnesota Protocol for RFI Testin, Michael A. Kelly, John A. Tarantin- "Radio Frequency Interference and the Breathalyzer: A Case Analysis"; New

Jersey State Police Radio Frequency Interference Testing Procedure for Breathalyzers) while other states or part of states have banned breath-testing machines until an effective method for combating the effect of radio frequency interference on the breath-testing machines could be developed (State v. Squires, appeal No. 82-363-AC 11th Circuit Court for Dade County, Florida, Jan 11, 1983; 5/ Durand v. City of Woonsocket et al. No. 82-4808, Dec. 15, 1982; (Superior Court of Providence County, Rhode Island); Romano et al v. Kimmelman et al, Docket No. L-024563-83E

 5 Amicus is not citing decisions of trial courts and other unpublished opinions as authority in support of any position. The point again is merely to illustrate the lack of record in this case. In any event, these sorts of decisions, while not controlling, may be given weight by this court. (See, e.g., King v. Order of Travelers (1948) 333 U.S. 153, 160-161; 68 S.Ct. 488; 92 L.Ed. 608.)

Superior Court of New Jersey April 27, 1983; State v. Benjamin Lopat et al (Drunk Driving Law Letter 2-3-41 vol. 2, no. 5, 7-22-83) Municipal Court of Highlands, New Jersey.) Judicial officers in seven states have concluded that, due to radio frequency interference, breath-testing machines give false readings which can lead to the conviction of innocent persons. (Richard A. Shaffer "Electronic Interference Rises, Causing Havoc in Many Fields "The Wall Street Journal, November 18, 1983, p. 31.)

The above discussion of radio frequency interference is not intended as an exhaustive discussion of reasons why breath-testing machines might produce incorrect readings of blood alcohol levels. A few of those problems are discussed in the footnote that

follows. 6/

 6 Electronic surges of power, i.e., unusual amounts of power above 130 volts or sudden diminution of power below 80 volts can cause an erroneous reading on the machine, independent of the radio interference of radio frequency interference or in conjunction with the radio frequency interference. (Orange County Trial Lawyer's Ass. "The Ninth Annual Drunk Driving Seminar" Syllabus 1982, p. 25, Winning Strategy for Drunk Driving Cases, supra, p. 143-146.)

An assumption made is that all persons have a normal body temperature of 98.6 degrees Fahrenheit. If the person has a temperature and is ill from a cold, flu, influenza, or any disease which could elevate the temperature, then the readings on the machine could be erroneous. A 1.8 degree Fahrenheit (1 degree Centigrade) variation in normal body temperature (98.6 degrees Fahrenheit) will produce a 7% error in the test favorable to the prosecution's position. (T.P. Casselman, "Body Temperature and the Breathalyzer Boobytrap", Michigan Bar Journal (Sept., 1982, p. 721.)

Breath-testing machines operate on the premise that there exists in every case of every person who blows into the machine a 1 to 2100 ratio between alcohol in the breath to the amount of alcohol in the blood; that is to say that for every one part of alcohol in aveolor (deep lung) air, there are 2100 parts of alcohol in the blood.

B.

The Indium Kit is an accurate method of preserving a breath sample which can be tested so as to avoid radio frequency interference.

The indium crimper kit has been cer-

The leading researcher in America on this subject states the true average is 1 to 2280 and that the range lies between 1900 to 2400 to 1 and that 14% of the time the breath-testing machines overestimate the blood alcohol level of the arrestees. Thus out of every 100 arrests, 14 persons have blood alcohol rates reflected by breath-testing machines that are lower than that shown on the readout of the breath-testing machine. Hence 14% of all persons may be convicted falsely based on the error of the 2100 to 1 ratio alone. (Erwin, Drunk Driving, Feb., 1984 Supplement, 33A-6.1, 33A.01.)

The intoxilizer absorbs infrared energy at 3.39 micron wavelengths by burning ethyl alcohol. Unfortunately, many substances can be found at 3.39 microns other than alcohol. Acetone is found in the human mouth and it reads out as ethyl alcohol. Diabetics have more acetone in their mouth than non-diabetics and one in 50 is a diabetic in the United States. (Winning Strategies in Drunk Driving Cases, 1984 Continuing Education Seminar; WC, p. 174-175.)

tified by the California Department of Health for use in the retention of breath samples, pursuant to Title 17, section 1221.3 of the California Administrative Code. (See J.A., p. 247.) The crimper kit is currently used in San Bernardino County by the San Bernardino County Sheriff for the retention of breath samples of arrestees for later reanalysis. (Reporter's Transcript of oral proceedings in People v. Tomas Lopez, et al., case number V-149446, in a hearing conducted in Division 71 of the Los Angeles Municipal Court on June 15, 1983; testimony of manufacturer and co-inventor of indium crimper kit, Mr. M.R. Forrester, p. 8:11-12, p. 56.) California is one of seven states which currently use the crimper device for retained breath samples. Other states use other devices to retain breath sam-

ples for reanalysis. Colorado uses the calcium sulfate collection agent or silica gel; Alaska and new Hampshire use the perchlorate system; and Arizona and Delaware use the silica gel method exclusively. (Id., p. 10.)

The indium crimper kit can be affixed to any breath-testing machine or can be used alone without attaching to any other device. (Id., p. 19.) The indium crimper kit does not require the unit to be plugged into an electrical outlet, but can, after being heated, be used independent of any other breath-testing machine or electrical outlet. (People v. Lopez supra, p. 33-34.) Thus the indium crimper device is the only unit which can collect a retained breath sample for reanalysis that is not subject to radio frequency interference. (People v. Lopez, supra, p. 33-34.)

The indium crimper kit consists of a wooden box which houses a handle, a heat thermostat element and two aluminum jaws which move when the handle is activate to form a vise. The device is assembled in the field by mounting the handle to the wooden box and removing the accessories, attaching a waste bag, a chemical value, and a power cord. Contained within the sealed wooden box is a check list of what the operator is to do. Also inside the wooden box is a filter, a T-Type mouth piece, a photograph of how to assemble the kit; and an indium template (which is an aluminum bracket which holds a piece of indium tubing).

The operator mounts the filter at one end and the valve and the T-Type mouthpiece at the other and affixes the jaws of the crimper. The wooden box is

then closed and the electrical connector is mounted and plugged in either to house or automobile current depending on the choice of the operator. The unit is operating at a temperature between 47 and 54 degrees and when the light comes on, the unit is ready for operation. The unit can then be unplugged from the current and operate independently. The operator can also check the thermometer inside the wooden box to make sure that it is within operating range. The waste bag is a visible means for the operator to know that the arrestee is blowing into the T-Type tube and that he has blown long enough to obtain deep lung air. A whistle blows at this point and the operator squeezes the handle of the crimper thus sealing into the template the air of the arrestee. The crimper device crushes both ends of the template

thus sealing in the air of the arrestee and sealing out all outside air. This retained air sample can be used by the arrestee or by the state since each crimp can produce three retained air samples individually separate one from the other. (People v. Lopez, supra, pp. 11-14.) These samples can be retained for retesting for as long as two years and still hold their integrity. In California administrative rules provide that the sample may only be relied upon if tested within 14 days. (People v. Lopez, supra, p. 14.) The 14-day rule is an administrative decision of the Department of Health, even though the sample can be retained scientifically for longer periods of time. (People v. Lopez, supra, p. 14.)

All existing breath-testing machines are capable of being modified so that

the indium crimper kit can be attached to existing devices and with the use of T-tubing the arrestee still need only blow twice and the air sample would go both into the crimper device and into the normal chambers of the breath-testing machine. (People v. Lopez, supra, pp. 11-14.) The indium crimper device can be built in at the factor for a little as \$50. (People v. Lopez, supra, pp. 16-17.)

The cost of the crimper device is \$300 and can be used millions of times; the cost of a box of indium templates would be \$13.90 and \$12.90 per box if purchased in quantity. (People v. Lopez, supra, p. 17.) The retesting of the retained air sample would cost \$2 to \$3. (People v. Lopez, supra, p. 14.) In sum, this device works, is reliable, and is the only means of securing a breath

sample which can be tested on a breath-testing machine insulated from the effects of radio frequency interference.

III

THE ENACTMENT OF A NEW STATUTE
INSURES THE USE OF BREATH-
TESTING MACHINES IN CALIFORNIA

Petitioner notes in passing a new statute, California Vehicle Code section 13353.5. (Brief for the Pet., p. 20, fn. 13; p. 22, fn. 15.) This statute provides that if a suspect in a drunk driving case takes a breath test, the police officers are required to advise the suspect that the breath-testing machine cannot preserve a sample of that breath, and that the suspect may choose a blood or urine test, or a waiver of the right to a preserve test will occur. 7/ This statute became

7 A full text of Vehicle Code § 13353.5 follows:

"(a) In addition to the requirements of Section 13353, a person who chooses to submit to a breath test shall be advised

effective on September 15, 1983. (Cal. Stats. 1983, Ch. 841; see No. 8 West's -----

before or after the tests that the breath-testing equipment does not retain any sample of the breath and that no breath sample will be available after the test which could be analyzed later by the person or any other person.

"(b) The person shall also be advised that because no breath sample is retained, the person will be given an opportunity to provide a blood or urine sample that will be retained at no cost to the person so that there will be something retained that may be subsequently analyzed for the alcoholic content of the person's blood. If the person completes a breath test and wishes to provide a blood or urine sample to be retained, the sample shall be collected and retained in the same manner as if the person had chosen a blood or urine test initially.

"(c) The person shall also be advised that the blood or urine sample may be tested by either party in any criminal prosecution. The failure of either party to perform this test shall place no duty upon the opposing party to perform the test nor affect the admissibility of any other evidence of the alcoholic content of the blood of the person arrested."

Cal. Legis. Service, pp. 4459-4461.)

What petitioner fails to note is the impact this statute has on this case. Apparently, petitioner's fear is that under the decision of the California Court of Appeal in this case the use of breath testing machines in California is no longer viable. The factual assumptions underlying this position are in error, as discussed above. But in any event, the issues presented by petitioner can no longer arise in California because of the new statute.

Under the statute, the use of a breath-testing machine will result in either a second, preserved test, or a waiver of any such preservation. In either event, no impairment to the use of the breath-testing machine arises. Thus, the enactment of this statute leaves no important issue for this court

leaves no important issue for this court to resolve.

An intervening change in the law justifies the dismissal of the writ of certiorari as having been improvidently granted where that change "bars the ultimate question presented in this case from again arising in that State." (Rice v. Sioux City Memorial Park Cemetery (1955) 349 U.S. 70, 73.)

CONCLUSION

The facts in this case are simply not what the petitioner has represented them to be. The facts as they truly exist do not permit a resolution of the Question Presented as framed by petitioner. Moreover, there are additional facts not presented by the record provided to this court. Thus, factually, this court's decision even on the record provided will have limited application,

in any, to the legal issues raised by the technology involved herein. Lastly, the passage of new legislation in California has rendered the issues in this case of no further importance since the use of the breath-testing machines has now been preserved.

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EXHIBIT "A"

AD HOC COMMITTEE ON BREATH TESTING

ADVISORY COMMITTEE ON ALCOHOL
DETERMINATION

Notes of Meeting: August 31, 1982

California State Department
of Health Services
Laboratory Services Branch
2151 Berkeley Way
Berkeley, California 94704

Departmental Representatives Present

Daniel R. Morales, Ph.D.
Chief, Clinical Chemistry
Laboratory Section

Ad Hoc Committee Members Present

Alfred A. Biasotti
(Representing State Department
of Justice)
Criminalist, Bureau of
Forensic Services
State Department of Justice

Richard E. Erwin
(Representing California Public
Defenders' Association)
Public Defender, Ventura County

Kathryn J. Holmes
(Representing California Association
of Criminalists)
Supervising Criminalist
Office of Sheriff-Coroner,
Contra Costa County

William C. Jordan
(Representing California Association
of Bioanalysts)
Presbyterian Intercommunity Hospital
Laboratory, Whittier, Ca

Charles R. B. Kirk
Deputy Attorney General
State Department of Justice

John D. Madall
(Representing Los Angeles
Police Department)
Commanding Officer, Scientific
Investigation Division
Los Angeles Police Department

Halle L. Weingarten
(Representing California Association
of Toxicologists)
Laboratory of Criminalistics,
Santa Clara County

Other Participant

Maxine Hutchin, Alameda County Sheriff
Department Crime Laboratory

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Therefore, the Ad Hoc Committee recommended to the Advisory Committee on Alcohol Determination the deletion of remote collection and later analysis from the regulations in Title 17.

The Ad Hoc Committee next considered a series of other issues related to the capture of breath alcohol samples for later analysis. These issues are summarized in the following statements:

1. The concept of remote collection of samples has been confused with the concept of breath sample retention for referee analysis.

2. There is no scientific need to retain a breath sample for referee analysis.

3. There is no reliable and practical way to retain a breath sample for referee analysis inasmuch as there is no breath sample capturing device which can meet the performance standards with regard to: air blank, calibration with a standard solution; quality control with a reference sample.

4. If regulations relative to retention of breath samples for referee analysis are needed for any reason, then new regulations should be written specifically for this application, including such performance standards as the number of replicates, storage,

stability, etc.

As was covered in the foregoing deliberations of the Ad Hoc Committee, remote collection of breath alcohol samples for later analysis was placed into the regulations to answer a specific problem which was postulated at one time; namely, the practical problem which could result from an officer's making an arrest at a location which was remote from an installed breath testing instrument. All the conditions set forth in the regulations for remote

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section and later analysis were developed for this specific application and not for another application, such as referee analysis. Referee analysis is analysis by the defendant of remaining sample, when sufficient sample remains [Section 1219.1(g), Section 1219.(g)(2), Section 1219.2(c), and Section 1219.2(c)(1)].